United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL
WITH PROOF
OF SERVICE

77-7121

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UNITED STATES COURT OF APPEALS
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United States Court of Appeals

FOR THE SECOND CIRCUIT

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,

Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND REQUEST FOR REHEARING IN BANC

BAER MARKS & UPHAM
299 Park Avenue
New York, New York 10017
(212) 832-1700
Attorneys for Defendant and Third Party Plaintiff-Appellant, Cities Service Oil Company

GEORGE H. COLIN
JEFFREY L. LIDDLE
Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-7121

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party
Plaintiff-Appellant,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.

Third-Party Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND
REQUEST FOR REHEARING IN BANC

Preliminary Statement

The appellant petitions for rehearing, in banc, of the decision* of a panel of this Court dated December 21, 1977. This Court held Cities Service Oil Company (hereinafter "Cities") to be liable to plaintiff for oil seepage from an oil storage plant operated by the third-party defendants MGO Corp. and Monticello Gas & Oil Co., Inc. (hereinafter collectively "MGO"). The oil plant had originally been owned by MGO, which sold it to Cities and concurrently leased it back from Cities. This Court did not pass on Cities liability for trespass,

* References to the decision of this court are made herein to "Opinion, p. ", a copy of which is appended hereto.

nuisance and negligence; it held Cities liable for breach of a stipulation of settlement entered into by Cities and MGO in a prior New York State court suit wherein plaintiff had sued both said parties for damage for oil seepage alleged to have occurred during a period prior to the period with which this suit is concerned. (Opinion, p. 3, lines 19-27; p. 4, lines 13-16).

Statement of Facts

The facts are fully presented at pages 5 through 14 of Appellant's Brief and will not be repeated here.

I

THE COURT OF APPEALS HAS ALLOWED PUNITIVE DAMAGES FOR FAILURE TO PERFORM A STIPULATION OF SETTLEMENT; THIS CONTRAVENES UNIVERSALLY ACCEPTED AUTHORITY, WHICH DOES NOT ALLOW PUNITIVE DAMAGES IN SUCH CIRCUMSTANCES.

The liability affirmed by the Court of Appeals herein was for simple breach of contract - failure to perform a stipulation of settlement - in that the operation of the oil terminal was not discontinued soon enough. This breach of contract involves no malice or evil motive warranting punitive damages. It is stated at §183 of 14 N.Y. Jur. Rev., Damages, page 45:

> "Since damages for breach of a contract are allowed as compensation for the injury or damage resulting from such breach rather than by way of punishment, the general rule in actions for breach of contract is that the damages are limited to the pecuniary loss sustained and that exemplary damages are not recoverable."

Id. Numerous cases to the latter effect are cited in Garrity v. Lyle Stuart Inc., 40 N.Y.2d 354, 358, 386 N.Y.S.2d 831, 833, 353 N.E.2d 793, 795 (1976); see also, Gordon v. Nationwide Mutual Insurance Co., 62 Misc. 2d 689, 309 N.Y.S.2d 420

(S. Ct. 1970), aff'd, 37 App. Div. 2d 265, 323 N.Y.S.2d 550 (2d Dep't), rev'd, 30 N.Y.2d 427, 334 N.Y.S.2d 601, 285 N.E.2d 849 (1972), cert. denied, 410 U.S. 942, 93 S. Ct. 1374, 35 L. Ed. 2d 593 (1973).

The stipulation of settlement did not prescribe the date by which the oil plant was to be shut down, nor was any proof offered below to show that plaintiff was in any way prejudiced or inconvenienced by any delay. To the contrary, the proof showed timely shutdown, in that the plant was shut down five months before commencement, in July 1973, of plaintiff's 1973 season.

In Point IV of appellant's brief, numerous authorities were submitted for the proposition that punitive damages were not recoverable in this case where there was no proof whatsoever of malice or evil intent on the part of Cities or, even, of an affirmative act on its part. Additional authority is found in 14 N.Y. Jur. Rev, Damages §176 at 36, where it is stated that:

> ". . .punitive damages, in excess of the actual loss, are allowed where the wrong is aggravated by evil motives, in order to punish the wrongdoer for his misconduct and furnish a wholesome example."

Id.

II

THE COURT OF APPEALS HAS DEPARTED HEREIN FROM THE ESTABLISHED RULE THAT PUNITIVE DAMAGES WILL BE ALLOWED ONLY UPON PROOF OF APPROVAL BY UPPER MANAGEMENT OF THE ACTS UNDERLYING LIABILITY; IN THE INSTANT CASE, THERE WAS NO SUCH PROOF

The decision of the Court herein makes reference

to Koufakis v. Carvel, 425 F.2d 892 (2d Cir. 1970), Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) and Williams v. City of New York, 508 F.2d 356 (2d Cir. 1974), as representing the rule applicable to the imposition of punitive damage liability against corporations for acts of subordinates. See also, Cohen v. Varig Airlines, S.A. Empresa, etc., 85 Misc. 2d 653, 380 N.Y.S.2d 450 (N.Y. Civ. Ct. 1975), aff'd as mod., 88 Misc.2d 988, 390 N.Y.S.2d 515 (App. T. 1976). The Williams case is cited for the proposition that a plaintiff:

> "must show that those persons in a position of authority . . . in some way authorized, ratified or fostered the acts complained of."

(Opinion, p. 9, lines 26-30). Williams held that the failure of the plaintiff to offer evidence of higher level involvement of the Police Department of the City of New York required dismissal of the punitive damage claim as a matter of law.

In the instant case, this Court, at page 11 of its opinion, characterizes Roy Langbein, a local construction and maintenance supervisor on the one hand, and Russell Smith, a general attorney of Cities (erroneously described in the decision as "general counsel"), on the other hand, as the "responsible management officials" satisfying the requirements of the aforementioned cases.

The record makes it clear that Langbein had no role whatsoever in management. He was a regional construction supervisor (A-447/20-21); he supervised no personnel (A-448/22-449/2); he had no authority of his own except as expressly conferred by his supervisor (A-449/3-5); and the authority,

if conferred, involved only the purchasing of materials and the issuance of contracts. (A-449/7-9). During and after 1972 Langbein supervised only the construction and maintenance of Cities' new service stations or those it operated and controlled. (A-449/14-18). Langbein did not supervise maintenance of the MGO plant (A-449/19-22; A-450/13-19; A-488/14-24); he first became aware of the plaintiff's complaints in August 1972, about six months after institution of this action (A-451/24-452/9) and had no awareness of the state court law suit. (A-453/ 17-21). When Langbein placed contracts to dismantle the tanks and buildings and remove the topsoil of the oil plant, he did not do so under his own authority, but by orders from above. (A-473/20-25). He certainly is not a management official in any sense.

Russell Smith, the general attorney referred to in this Court's decision as the other high level management figure, is mentioned in the record (E-115) in connection with the settlement of the prior state court action wherein Cities' local counsel states:

> "Let the record further show that counsel for the defendant Cities Service Company has been in telephone communication contact this day with Mr. Russell H. Smith, Esq., General Attorney for Cities Service Oil Company in Tulsa, Oklahoma and said Russell H. Smith has authorized counsel for Cities Service Oil Company to enter into the foregoing stipulation."

(E-115). It is self-evident that a lawyer employed in the Law Department of a corporation who merely authorizes the settlement of a lawsuit is not a management official and the authorities so hold. It is stated in 2 Fletcher Cyc. Corp., §483 (Perm.

Ed. 1969) that even a general solicitor or general counsel of a corporation has no authority to bind the corporation to a contract. Id. This is all the more so in the case of a "general attorney" whose job title clearly denominates him as one whose work involves only litigation, a limited involvement far removed from managerial activity on the executive side of the corporate function. There can be no justification for assuming that, because Russell Smith authorized the settlement of the state court action, he thereby became a manager who "ratified" some subsequent non-act out of which liability is rationalized. What is the basis of liability that was "ratified"? Is it concurrence in the desired shut down of the plant or is it waiting until MGO moved out after it completed its new plant? These non-acts are in furtherance of the stipulation and its objective that the plant be shut down. Whatever may be the hard-to-discern liability for breach of the stipulation, there was no showing in the proof that Russell Smith had anything to do with it. Such showing was the plaintiff's burden, Denton v. Ontario Nat'l Bank, 150 N.Y. 126, 44 N.E. 781 (1896), and the plaintiff utterly failed to prove involvement of Cities' management in the liability found against it.

III

IN AFFIRMING THE DISMISSAL OF THE THIRD-PARTY COMPLAINT, THIS COURT DEPARTED FROM ESTABLISHED LAW WHICH HOLDS TO BE VALID AND ENFORCEABLE LEASE PROVISIONS WHEREUNDER TENANTS INDEMNIFY LANDLORDS FROM LIABILITY TO THIRD PARTIES, EVEN WHERE THE LANDLORDS' ACTS OR OMISSIONS MAY CONTRIBUTE TO SUCH LIABILITY

A recent decision of the New York State Court of Ap-

peals (Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d 153, 397 N.Y.S.2d 602, 366 N.E. 2d 263 (1977) - a copy of which was appended to Cities' main brief herein) holds a tenant liable to a landlord under a lease indemnity provision even where the landlord is a negligent party sharing negligence with the tenant. This Court's decision states that it does not consider Hogeland to be relevant in the instant case "when the landlord commits an intentional tort". (Opinion, p. 6, lines 1-3). It may be observed, initially, that this Court's finding of liablity against Cities is based on contract - breach of the state court agreement of settlement - and not on a tort. Moreover, the breach found to be chargeable to Cities was failure to do what was necessary either to abandon the oil terminal within a proper time, or to build a seepage control system. Under either alternative, the dereliction is one of omission, and not of commission, and is not "intentional", as found by this Court.

It is submitted that this Court erred in its premise that affirmance of the dismissal of the third-party complaint was proper in that:

> ". . . appellant may not now insist that MGO make it whole, under a lease indemnification clause, for damages resulting from its own failure to discharge that obligation."

(Opinion, p. 6, lines 9-12). This statement ignores the fact that MGO was a party to the state court settlement together with Cities, and that MGO assumed the self-same obligations as Cities under the stipulation. Indeed, MGO's obligations in the fulfillment of the stipulation were substantially greater than those of Cities, since MGO was the occupant which had to vacate

the plant and MGO, not Cities, controlled the construction of MGO's new oil terminal which needed to be completed before the leased oil terminal could be shut down. (See Opinion, p. i, n.2). The common responsibility of MGO and Cities in respect of the stipulation of settlement is akin to the common responsibility of the landlord and tenant, as co-defendants, in the Hogeland case where the New York Court of Appeals found the tenant bound under the indemnity.

Regardless of whether or not the state court stipulation of settlement was breached, the damage asserted by plaintiff was caused by the seepage of oil during the course of MGO's use and operation of the premises. In the circumstances, since MGO had the same responsibility as Cities for performance of the state court stipulation and was under the lease obligations hereinafter noted, MGO's liability under the lease indemnification provision (E-105, ¶8) is clearly based upon its use of the premises and its own failure to perform the state court settlement - if there was such a failure. Under paragraph 6 of the lease, MGO was obliged to "maintain the premises in good condition" and "make all repairs of every nature and description, except structural, to the demised premises .... "(E-105, ¶6 and E-107). To the extent that any applicable laws, rules, regulations or requirements of governmental authorities prohibited or regulated the discharge of oil from the premises, MGO was obliged, under paragraph 5 of the lease, to comply therewith. (E-105, ¶5). This Court's decision erroneously states that such compliance was the responsibility of Cities. (Opinion, p. 3, lines 10-15).

It is submitted that Hogeland is controlling herein. The reference to adhesion principles mentioned in footnote 4 of this court's opinion is nowhere confirmed in this record. It is noteworthy that adhesion was not found in Levine v. Shell Oil Co., 28 N.Y.2d 205, 321 N.Y.S. 2d 81, 269 N.E.2d 799 (1971) where Shell Oil Company's form of lease was executed by a service station tenant. In this case, the tenant is a petroleum wholesaler of obviously greater financial substance than was the tenant in Levine; indeed, MGO owned the oil terminal before selling it to Cities.

IV

THE COURT OF APPEALS ERRED IN AFFIRMING THE GENERAL DAMAGE VERDICT

The decision of this Court takes no account of Thomann v. City of Rochester, 256 N.Y. 65, 176 N.E. 129 (1931), which is cited at page 48 of appellant's brief for the proposition that damages in an action at law are recoverable only to the date of suit, which in this case was February 25, 1973, whereas the trial court admitted proof of damages running through plaintiff's 1976 season. If this decision by Judge Cardozo is controlling, then there was clear error below.

The record herein does not justify the statement at page 7 of this Court's opinion that there were no independent causes of pollution or damage. This statement is controverted by the plaintiff's president's own written claims of pollution by raw sewage and its president's testimony that the sewage

could be seen and smelled. (See Appellant's Reply to the Brief of Doralee Estates, Inc., at 10-13, citing, E-93 and E-97). Further objective proof that plaintiff's claimed damages were attributable to an additional independent cause is found in the fact that plaintiff sued in the State Supreme Court to establish that the Village of Monticello caused it loss of rentals by improper construction work. (E-140-E-142). Against the aforementioned uncontradicted proof it cannot fairly be stated that there was "little to support Cities' contention of independent causes of pollution." (Opinion, p. 7, lines 26-30).

In addition, the plaintiff, in its state court action against Cities and MGO, claimed damages for like pollution for the years 1965 to 1972. It is self-evident that this seven year period, covered by a prior settlement and release, is far more accountable as a cause of pollution and damage than is the ten month subsequent period between settlement of the state suit and shutdown of the plant. It is submitted that the case of Burt Olney Canning Co. v. State of New York, 230 N.Y. 351, 130 N.E. 574 (1921), cited at page 8 of the court's decision is consistent with the cases cited at page 43 of appellant's brief for the proposition that one party causing damage should not be held accountable for the total damage when it is clear that other parties concurrently performed acts resulting in the claimed damage. Indeed, Burt Olney cites Chipman v. Palmer, 77 N.Y. 51, 33 A.L.R. 566 (1879) and O'Donnell v. City of Syracuse 184 N.Y.1, 76 N.E. 738 (1906), with approval, for the proposition, as contended by appellant, that Cities is

subject to liability for its share of damages ". . . if apportionment was possible". In Burt Olney, the court pointed out that "There was no attempt at segregation [of damages] here.... [E]ven if there was no possibility of apportionment, either accurate or approximate, the right to nominal damages remained." Burt Olney, 230 N.Y. supra at 356, 130 N.E. at 576. It is clear from the foregoing that Burt Olney, like Chipman and O'Donnell, required plaintiff to effect at least an approximate allocation of the damages attributable to the appellant, failing which it would be limited to nominal damages.

The question is begged by the cases cited at page 7 of this Court's opinion, which deal with the sufficiency of damages of less than precise or exact nature. The question here is not whether plaintiff made out a sufficient approximate showing of damages but, rather, whether it failed, within the rule of Chipman and Olney, to make the required segregation of damages between the independent causes which indisputably existed in this case. It is pointed out that Nordone v. Mondo, 269 App. Div. 896, 56 N.Y.S. 2d 606 (4th Dep't 1945), which is cited in this Court's opinion, holds, in consonance with Chipman, O'Donnell and Burt Olney, that where plaintiff's damage resulted from several different causes, it is entitled to damages only as allocable to the defendant's acts, and is obliged to offer proof which segregates the differently caused items of damage.

The opinion of this Court makes no reference to the showing at pages 45 through 48 of appellant's brief that plain-

tiff's proof of damages was legally insufficient. The estimate of $21,000 cost of the unperformed work of dredging the lake and removing stumps therefrom was irrelevant because plaintiff offered no proof that the damage to the underwater lake bed resulted in a $21,000 diminution in the value of plaintiff's property. The proof of alleged rent loss was inadequate because it involved nothing more than proof that the rents at plaintiff's bungalow colony were lower than the rents at other bungalow colonies, without testimony to show that the differential was due to any circumstance chargeable to Cities. Appellant's brief, at pages 45 through 48, and its reply to the brief of Doralee Estates at pages 15 through 20, analyze the deficiencies in plaintiff's proof of damages. Every plaintiff has an obligation to adduce legally sufficient proof of damage, as well as of liability. In the instant case, the plaintiff did not meet this burden.

V

THE VERBATIM CHARGE TO THE JURY RELATIVE TO THE NEW YORK CRIMINAL STATUTE CONCERNING POLLUTION WAS CLEAR ERROR

The trial judge, over objection, read to the jury the New York statute making it a crime to pollute waters of the state. (A-1283/17-A-1285/11). Cities was neither charged with, nor convicted of, any such crime; nor was it a party to the administrative proceeding whereunder MGO entered into a consent decree with the State Department of Conservation.

It was deeply prejudicial to Cities to lay a criminal pollution statute before the jury. Doing so suggested great culpability on the part of Cities and, in effect, directed the jury to consider, in this civil case, whether Cities was a criminal offender. In light of this Court's finding that Cities did no more to breach the stipulation of settlement than shut down the plant "too late", it is self-evident that the reading of a criminal statute concerned with affirmative acts involving pollution of state waters was highly prejudicial and erroneous in implying that Cities might have done something that it clearly did not. Violation of the criminal statute was not an issue in this case; it should not have been put before the jury.

It is difficult to understand why this Court, in footnote 10 of its opinion, faults Cities for not having somehow voluntarily entered the quasi-criminal proceeding against MGO in which the Conservation Department was free to, but did not, join Cities.

VI

THERE WAS NO BASIS FOR A FINDING OF LIABILITY AGAINST CITIES UNDER THE COMPLAINT; THE ALLOWANCE OF AN AMENDMENT DURING TRIAL TO PLEAD BREACH OF THE STATE COURT SETTLEMENT AGREEMENT WAS ERRONEOUS AND SHOULD NOT HAVE BEEN AFFIRMED

Implicit with the affirmance by this Court is the finding that Cities was not liable to plaintiff for trespass, nuisance or negligence; the affirmance is predicated on the finding that Cities breached the stipulation of settlement, a

claim that does not appear in this case until after the close of the plaintiff's case and the making of motions to dismiss. (Opinion, p. 13, lines 13-20; A-1326). At this point there was no reference to a claim of breach of the stipulation of settlement and such a claim had at no time before been mentioned by plaintiff's attorney. The record is clear that it was the trial judge, rather than plaintiff's counsel, who devised the claim of breach of the stipulation of settlement. (A-853/-15-A-860/12). The court alone articulates the new claim and displays a full awareness that the claim is different from the plaintiff's pleaded claim to rescind the prior settlement. At A-860/6 the court inquires of plaintiff's counsel:

> "You are not asking that this release be voided so you may go for damages prior that time?"

This inquiry makes it clear that the court was fully aware that the claim for rescission would involve no more than an opportunity for the plaintiff to recover larger damages for the period 1965 to 1972 involved in the state court action, whereas a claim for breach of the settlement agreement would involve damages for a subsequent period. Immediately prior to summation, plaintiff's counsel disclaimed the contract claim interjected by the trial judge. (A-1179/14-15). It is submitted that the court's affirmative intervention to frame a new cause of action that had not, up to that time, been broached or intimated by plaintiff's counsel, constitutes interference with the adversarial basis of litigation and, consequently, reversible error. No party to a litigation should be required to overcome tactics interjected by the court, as well as those of the adversary. Moreover, the court extended the damage period by six months by permitting reformation of plaintiff's general

release on the legally impermissible ground of plaintiff's unilateral misunderstanding. See, 6 N.Y. Jur., Cancellation and Reformation of Instruments, §§39-41.

VII

CITIES' REQUEST FOR REHEARING IN BANC SHOULD BE GRANTED BECAUSE THIS CASE INVOLVES SEVERAL QUESTIONS OF EXCEPTIONAL IMPORTANCE

A request for rehearing in banc will be granted "... when the proceeding involves [a] question[s] of exceptional importance." FRAP 35(b). The instant proceeding involves at least five questions of exceptional importance: (1) whether a simple breach of contract claim can sustain punitive damages; (2) whether a party may be held liable for punitive damages when no acts - but only omissions - are charged against it and no malice or evil intent is shown; (3) whether a corporate party can be held to answer in punitive damages when the proof purporting to represent management approval or ratification of the alleged acts - or, as here, omissions - is based only on awareness on the part of a local service supervisor or a corporate general attorney; (4) whether a trial judge may read a criminal statute to the jury and instruct the jury in a civil case to consider possible violation of a criminal statute under which the defendant has neither been charged nor convicted and where statutory liability is not claimed as a ground of recovery; and, (5) may a trial judge intervene to frame an amended cause of action on a hitherto unpleaded theory which had not theretofore been broached or requested by plaintiff's attorney and to which the defendant never consented.

It is submitted that in deciding these questions Court of Appeals has departed from established law. A rehearing in banc should, therefore, be granted.

CONCLUSION

Appellant's petition for rehearing and request for rehearing in banc should be granted. Upon rehearing, this Court's decision should be recalled and a decision rendered as prayed in Appellant's appeal.

Respectfully submitted,

BAER MARKS & UPHAM
299 Park Avenue
New York, New York 10017
(212) 832-1700
Attorneys for Defendant - Appellant and Third-Party Plaintiff-Appellant Cities Service Oil Company

George H. Colin
Jeffrey L. Liddle,

Of Counsel

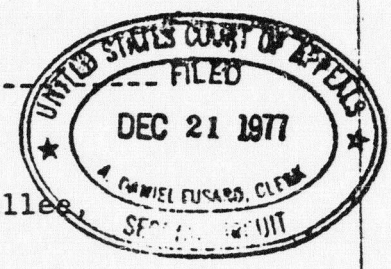
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 149 -- September Term, 1977

Argued October 27, 1977 Decided December 21, 1977

Docket No. 77-7121



DORALEE ESTATES, INC.,

Plaintiff-Appellee,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants-Appellees.

Before FRIENDLY, GURFEIN and MESKILL, Circuit Judges.

Appeal from a judgment entered for plaintiff by the District Court of the Southern District of New York (Owen, D.J.) after a jury trial in a diversity action to recover for damages caused by pollutants discharged from an oil terminal. The defendant, owner-lessor of the terminal, appealed also from an order dismissing its third-party claim against its distributor, the lessee and operator of the terminal, and from an order denying the lessor's motion to reduce the amount of punitive damages fixed by the jury. The Court of Appeals held: (1) lease repair and indemnity provisions would not, as a matter of law, absolve the lessor of the terminal from liability for spillage when the lessor undertook by virtue of a stipulation

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entered in state court responsibility to abate the pollution; (2) the plaintiff's proof of damages was sufficient, [illegible] tive damages could be imposed on a corporation if continuing tortious conduct is known to important managerial officials who have authority to prevent it; and (4) the district court did not err in allocating peremptory challenges or in permitting plaintiff to amend its pleadings to seek damages for breach of the state court stipulation.

The judgment is affirmed.

GEORGE H. COLIN, New York, N.Y. (Baer Marks & Upham and Jeffrey L. Liddle, New York, N.Y., of counsel), for Defendant and Third-Party Plaintiff-Appellant.

GERALD ORSECK, Liberty, New York (Orseck Law Offices and Robert Orseck, Liberty, New York, of counsel), for Plaintiff-Appellee.

JOSEPH D. AHEARN, New York, N.Y. (Grubbs, Leahy & Donovan, New York, N.Y., of counsel), for Third-Party Defendants-Appellees.

FPI—Sandstone
9-8-75—175M—903

GURFEIN, Circuit Judge:

This appeal arises out of a diversity action brought by plaintiff, Doralee Estates, Inc., to recover for damages to its bungalow colony in Monticello, New York, allegedly caused by an oil spill. Defendant Cities Service Oil Co. (hereinafter "Cities") appeals from a judgment of the United States District Court for the Southern District of New York (Owen, D.J.), entered on a jury verdict, and also from an order dismissing Cities' third-party claim against MGO Corp. and Monticello Gas & Oil Co., Inc. (hereinafter collectively "MGO"), and an order denying Cities' motion to reduce the amount of punitive damages fixed by the jury.

Plaintiff alleged that fuel oil waste and other pollutants had been discharged onto its property from an oil terminal operated by MGO and owned and leased by Cities. The jury so found, and awarded $60,000 in compensatory damages and $200,000 in punitive damages. At the close of plaintiff's case, the district court denied a request for a directed verdict dismissing plaintiff's claim. The court granted a motion by MGO to dismiss Cities' third-party claim against it. After verdict, the court denied a motion to set aside the verdict, for judgment notwithstanding the verdict, and for reduction of the punitive damages award. From the denials, Cities appeals.

Cities maintains that the plaintiff failed to establish Cities' liability or to prove any damage, and that the issue of punitive damages should not have been submitted to the jury. It contends also that the court erred in its method of empanelling the jury, and made erroneous and prejudicial rulings at trial.

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I

Cities contends that under no circumstances could it have been liable for trespass, negligence or nuisance as a matter of law because MGO was obligated, under its lease with Cities, to take all measures that were necessary to abate pollution from the Monticello plant.

Cities was not only the landlord of the oil terminal; it was also the supplier of the oil to MGO. Cities' name appeared on the terminal and its colors and emblems were on the trucks. The lease between Cities and MGO provided that the tenant should maintain the demised premises in good condition and make all non-structural repairs, and that the landlord should make any alteration, improvement, or structural addition required by municipal or government authorities. The landlord also retained the right to enter for inspection or repair, but this right was not to be deemed to impose upon the landlord any obligation to effect repairs. Appellant stands upon the lease.

Whether the lease provisions standing alone would exonerate a lessor from all responsibility to prevent oil run-offs from its leased plant is problematic under New York law. See Putnam v. Stout, 38 N.Y.2d 607, 381 N.Y.S.2d 848, 345 N.E.2d 319 (1976).[1] We need not decide the question, however, since there was other evidence from which the jury could conclude that Cities affirmatively undertook, dehors the lease, to abate the pollution.

Cities entered into a stipulation before the New York State Supreme Court in April of 1972, three years after the lease was executed. The stipulation was made in

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settlement of a lawsuit brought by Doralee Estates against both MGO and Cities to recover for damages caused by oil spillage from the Monticello plant. Under the settlement, plaintiff was to recover $12,500, of which $7,000 was to be paid by Cities and $5,500 by MGO for past damage. For the future, defendants agreed that they would abandon use of the premises for oil distribution purposes or, alternatively, that they would submit construction plans to the court, within sixty days, designed to eliminate the discharge of petroleum products into Doralee's lands and lakes and would commence the implementation of such plans within sixty days after the court's approval.

There was ample factual basis for the jury to find that Cities by the stipulation, undertook independent obligations which exceeded those provided for in the lease, and that Cities breached that stipulation. Although a plan for structural alterations was timely submitted to the court in June of 1972, no alterations were ever begun.[2] Rather, MGO ultimately abandoned the premises in February of 1973, only when its new terminal was completed. The jury might well have concluded that Cities, in fact, never intended to effect changes in the Monticello plant, but had submitted plans solely to buy time until MGO's new site could become operational. Such a strategy would hardly be consistent with the settlement agreement, which contemplated that Cities and MGO would decide whether to abandon or abate, and that either abandonment or abatement would occur in expeditious fashion -- not ten months after the stipulation was filed.

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There was evidence from which the jury could find that Cities, by its conduct as well as by the stipulation, assumed practical responsibility for whatever repairs were necessary to prevent seepage. Employees of both MGO and Cities testified that all structural repairs (and not merely those required by governmental authority) required Cities' approval. According to Sam Green, MGO's manager, Cities paid for the culvert, the containers under oil load racks, and the catch ditch which collected spillage. Leroy Langbein, manager of construction and maintenance for Cities' New York region, acknowledged that Cities made all structural repairs, installed the catch ditch and dismantled the plant. Moreover, an investigator for the New York Department of Environmental Conservation testified that large quantities of oil were spilled, as the plant was dismantled by Cities itself in the summer of 1973.[3] The district court was right, therefore, to submit Cities' liability to the jury, and to deny Cities' motions to set aside the verdict or to direct a judgment n.o.v.

II

The dismissal of Cities' third-party complaint raises separate questions. Cities' complaint against MGO alleged that it was entitled to indemnity by virtue of the hold harmless clause in the lease. That clause provided:

> "Tenant agrees to defend, indemnify and save harmless the Landlord from any and all claims, demands, suits, actions, judgments and recoveries for or on account of damage or injury (including death) to property or person of himself, his family, servants, agents or any other person, firm or corporation, caused by or due to the condition or use of said premises or the streets or roads on which they abut."

We find it unnecessary to decide whether this indemnity provision is enforcible under New York law when the landlord commits an intentional tort.[4] Cities is not simply a landlord who was negligent in failing to avert dangerous conditions on its premises. The jury found Cities liable for its intentional violation of its obligations to abate the pollution under the state court stipulation. Having assumed an affirmative obligation, outside the lease, to prevent oil seepage, appellant may not now insist that MGO make it whole, under a lease indemnification clause, for damages resulting from its own failure to discharge that obligation. We have no reason to think that, in the circumstances, the New York courts would permit a lessor to escape the direct consequences of its own intentional breach of a settlement agreement. See note 4, supra.

We also find no merit in Cities' contention that the trial court erred in denying Cities' motion to amend its pleadings at the close of trial to include a common-law claim for indemnification or contribution under Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972). From the outset, Cities' trial strategy was to argue that it bore no responsibility whatever for seepage from the Monticello terminal. It, accordingly, made no claim for contribution, which would have posited a joint liability. Since Cities had elected for tactical reasons not to acknowledge the slightest culpability, the district court did not abuse its discretion in declining to accept a proposed Dole v. Dow Chemical instruction, proffered just two hours before the jury was to be charged, under which the jury could apportion liability between Cities and MGO.

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III

Appellant further submits that the plaintiff failed to establish damages. Cities argues here, as it did at trial, that Doralee Estates failed to prove how much of its claimed diminution in property value was attributable to seepage from the MGO plant which occurred after the effective date of the release executed by Doralee pursuant to the April 1972 state court settlement.[5] In Cities' view, Doralee was obligated to establish that discharge from the MGO plant which occurred before the 1972 release was in no part responsible for its claimed damages. Cities further suggests that other pollutants such as sewage, discharge from another petroleum plant, and automobile exhaust and leakage contributed to Doralee's damages.

We think that Cities overstates plaintiff's burden. When a defendant's tortious acts are of a nature which preclude precise ascertainment of damages, the jury may make "a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). Lee v. Seagram, 552 F.2d 447, 455 (2d Cir. 1977); National Conversion Corp. v. Cedar Bldg., 23 N.Y.2d 621, 630, 298 N.Y.S.2d 499, 246 N.E.2d 351 (1969); Nordone v. Mondo, 56 N.Y.S.2d 606, 269 App. Div. 896 (4th Dept. 1945).

A review of the record convinces us that there was, in fact, little to support Cities' contention of independent causes of pollution. The jury could reasonably have found that oil seepage occurring after the 1972 release caused the conditions for which Doralee sought compensation.

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namely, lost rents and an accumulation of oil saturated materials in its lake. This case is thus distinguishable from those cited by appellant, Chipman v. Palmer, 77 N.Y. 51 (1879) and Ponderosa Pines, Inc. v. Queens Dairy Farm, Inc., 48 App. Div. 2d 760, 368 N.Y.S.2d 358 (4th Dept. 1975), where the records were devoid of proof of the respective culpability of multiple tortfeasors. More to the point is Burt Olney Canning Co. v. State of New York, 230 N.Y. 351, 356, 130 N.E. 574 (1921), where Judge Cardozo observed in response to an argument similar to that pressed by Cities here:

> "Recovery would not fail altogether because the division of the consequences might be uncertain and approximate.... The law is generous in the license that it accords to the triers of the facts when seeking to segregate the damages...." [Citations omitted.]

IV

With respect to the punitive damage award, Cities maintains that Judge Owen should not have submitted the question to the jury because plaintiff failed to establish that malicious conduct was authorized or ratified by its officers or directors. It contends that punitive damages may not be imposed if the echelon of responsibility for authorization or ratification is any lower. Appellant takes exception to Judge Owen's charge to the jury that "[y]ou may not impose punitive damages on a corporation, however, unless a responsible management official or officials of the company, or the relevant division, either authorized, participated in, consented to, or after discovery ratified the conduct giving rise to such damages." Relying

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on Koufakis v. Carvel, 425 F.2d 892 (2d Cir. 1970), and Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967), Cities contends that knowledge on the part of corporate officers or directors is a prerequisite to the imposition of punitive damages. We assume that New York law governs the propriety of an award of punitive damages. Givens v. W.T. Grant Co., 457 F.2d 612, 614 (2d Cir.), vacated on other grounds, 409 U.S. 56, modified, 472 F.2d 1039 (1972); 1A Moore, Federal Practice ¶ 0.310 (1974 ed.).

Though some language in Koufakis v. Carvel, supra, may be supportive of appellant's argument, we do not believe that the decision forecloses a holding that punitive damages were properly assessed in this case.

Though in Roginsky v. Richardson-Merrell, Inc., supra, we did not have to decide "whether, under New York law, the acts of inferior supervisory employees [inferior to divisional vice-presidents] would otherwise be deemed the acts of the corporation for purposes of assessing punitive damages," 378 F.2d at 842, n.17, we did note that "New York adheres to the 'complicity rule' holding the corporate master liable for punitive damages 'only when superior officers either order, participate in, or ratify outrageous conduct'" citing Morris, Punitive Damages in Personal Injury Cases, 21 Ohio St. L. J. 216, 221 (1960). See 378 F.2d at 842. In Williams v. City of New York, 508 F.2d 356, 361 (2d Cir. 1974), we said that a plaintiff "must show that those persons in a position of authority ... in some way authorized, ratified or fostered the acts complained of."

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The test of who is a "superior officer" or a "person in authority" to bind the corporate entity to participation or ratification cannot be rigid. We have mentioned with approval an observation of Professor Morris that a crucial factor is whether "the case calls for institutional correction not likely to be forthcoming without a punitive damage award." Roginsky, supra, 378 F.2d 842, n.18, citing Morris, supra, at 221. The question is whether the act or ratification is done by a person of such responsibility as to arouse the "institutional conscience." Id. The test is whether the continuing tortious conduct has been brought home to the consciousness of relatively important managerial personnel with authority to make a decision for the corporation that would have prevented the damage. To hold that punitive damages may not be imposed unless there is participation in the tortfeasing decision by the highest corporate executives is unrealistic given the size of giant corporations like appellant whose operations are so far-flung. See General Motors Acceptance Corporation v. Froelich, 273 F.2d 92, 94 (D.C. Cir. 1959).[6] It is true that stockholders ultimately bear the cost of liability, but those who have been given authority to avert environmental damage should be given some incentive to do so. "Smart money" is the traditional way, and the type of modern tort represented here is a fair field for punitive damages, carefully restrained by practical considerations, such as the number of persons affected and the consequent unbearable burden that might be imposed by a multiplication of punitive damages.

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Here there can be no doubt that responsible management officials were fully cognizant of the pollution emanating from the Monticello terminal. Langbein, Cities' regional maintenance manager, testified that he was aware of the seepage and of a pollution citation issued in April of 1973 by the New York Department of Environmental Conservation. The general counsel for Cities, in its home office in Tulsa, authorized the April 1972 state court settlement and was apprised by Langbein of the ongoing pollution at the Monticello terminal. Given this evidence of knowledge and inaction on the part of responsible management officials, we do not find error in the submission of the punitive damages question to the jury.

Nor are we inclined to disturb the jury's assessment of those damages. Remittitur, although reconcilable with the Seventh Amendment,[7] is an expedient to be employed with circumspection. Since punitive damages by their nature do not admit of precise determination, their evaluation is properly within the discretionary province of the jury, and will be overturned only if "shockingly" or "grossly" excessive. Faulk v. Aware, Inc., 19 A.D.2d 464, 470, 244 N.Y.S.2d 259 (1st Dept. 1963), aff'd, 14 N.Y.2d 899, 252 N.Y.S.2d 95, 200 N.E.2d 778, modified, 253 N.Y.S.2d 990 (1964), cert. denied, 380 U.S. 916 (1965). See Lanfranconi v. Tidewater Oil Co., 376 F.2d 91 (2d Cir.), cert. denied, 389 U.S. 951 (1967); Stevenson v. Hearst Consol. Publications, Inc., 214 F.2d 902, 911 (2d Cir.), cert. denied, 348 U.S. 874 (1954); Szekely v. Eagle Lion Films, Inc., 140 F. Supp. 843, 850 (S.D.N.Y. 1956), aff'd, 242 F.2d 266, 269 (2d Cir.), cert. denied, 354 U.S. 922 (1957). We cannot so characterize the $200,000 award made here.

The jury could reasonably have found that, for a substantial interval, responsible officials of Cities elected to ignore their obligations under the April 1972 stipulation and the New York Environmental Act.[8] In view of the resources Cities could have brought to bear to abate the pollution in Monticello and the deliberate decision by responsible persons not to do so, the award does not appear manifestly excessive.[9] Exemplary damages are intended to inject an additional factor into the cost-benefit calculations of companies who might otherwise find it fiscally prudent to disregard the threat of liability. To function effectively, the award must be "of sufficient substance to 'smart' ... the offender." Reynolds v. Pegler, 123 F. Supp. 36, 41 (S.D.N.Y. 1954), aff'd, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1965).[10]

V

Relying on John Long Trucking, Inc. v. Greear, 421 F.2d 125 (10th Cir. 1970), Cities submits that the trial court committed prejudicial error in not granting three peremptory challenges each to Cities and MGO, and in concluding that Cities waived the challenge over which it had sole control. As the original third-party complaint was framed, Cities and MGO did not assume adverse positions on any jury issue. Rather, their hostile interest concerned a question of law based on Cities' alleged contractual right of indemnification. The trial judge was well within his discretion under 28 U.S.C. § 1870[11] to allot Cities and MGO one peremptory challenge each to be exercised individually

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and three peremptory challenges to be exercised jointly, since the third-party defendant was in the same position as the defendant in resisting the claim of the plaintiff. See Carey v. Lykes Brothers Steamship Company, 455 F.2d 1192, 1194 (5th Cir. 1972); Moore v. South African Marine Corp. v. Gulf Stevedore Corp., 469 F.2d 280, 281 (5th Cir. 1972).

On the question of waiver, we find no abuse of discretion in the trial court's distribution of challenges so that Cities was required to exercise its single peremptory challenge in a given round or waive it altogether.

Finally, the district court did not err in submitting to the jury plaintiff's claim that the stipulation had been breached by appellant. Plaintiff's eighth cause of action alleged that Cities had violated the New York state court stipulation. As originally filed, the complaint requested rescission of the stipulation agreement. The plaintiff moved at trial to amend its pleadings to seek damages for breach of the agreement. The district court was within its proper scope of discretion under Rule 15(b) in granting the motion of Doralee to conform its pleadings to the proof. The damages resulting from the breach of the stipulation depended upon the same facts that would support rescission, and were precisely the same as those flowing from the claims for relief for nuisance, trespass and negligence.

We have carefully examined appellant's other claims of error and find them without merit.

The judgment is affirmed.

F O O T N O T E S

1. Putnam v. Stout, supra, held that a lessor could be held liable for injuries sustained by a customer of its tenant on the basis of a lease covenant obligating the lessor to keep the premises in good repair.

2. The court never took action on the plans. Cities' counsel acknowledged at oral argument that the reason was perhaps, indeed, because MGO was then involved in construction of another plant, and the matter was not pressed pending its completion.

3. Cities submits that the seepage onto plaintiff's lands was caused by MGO's negligence in overfilling trucks and permitting an oil separator to become clogged with dirt and snow. There was, however, testimony from which the jury could have concluded that the oil trap was poorly designed to handle spillage and that, in the circumstances, some overflowing was almost impossible to avoid. In any event, the issue as framed by Cities was not whether MGO was in part responsible for the seepage, but whether there was a sufficient basis for the jury to conclude that Cities was culpable.

4. The district court dismissed Cities' third-party claim in part on the authority of McLean v. L.P.W. Realty, 507 F.2d 1032 (2d Cir. 1974), where we expressed doubt as to the conscionability and enforcibility under New York Gen. Oblig. Law § 5-321 of a lease indemnification

clause. Appellant contends that McLean does not accurately reflect New York law after Hogeland v. Sibley, Lindsay & Curr Co., _____ N.Y. Supp. _____, _____ N.Y.2d ____ (1977), where the court construed § 5-322 to require indemnification of a shopping center landlord by a tenant for injuries sustained by one of the tenant's customers. Hogeland held that even where a landlord is himself negligent, he may nevertheless recover under an indemnity clause provided that the indemnity clause does not expressly except negligence from its coverage.

That Hogeland should be read, as appellant urges, to sustain the clause at issue in the instant case is by no means clear, however. The Court of Appeals in Hogeland was careful to leave open the possibility that adhesion principles might be applicable in a commercial lease setting, and also noted specifically that there was no suggestion of overreaching or disparity in relative bargaining positions either in the action before it or in Levine v. Shell Oil Co., 28 N.Y.2d 205, 321 N.Y.S.2d 81, 269 N.E.2d 799 (1971), where the court also sustained a lease indemnification provision. A somewhat different negotiating context is presented here, since MGO was a distributor of Cities, whose net worth was stipulated to be $1.336 billion, and the lease, though it had some negotiated changes, was on a printed form containing Cities' name and logo. We need not plunge into the thicket of New York law since Cities had obligated itself by independent stipulation for the benefit of the plaintiff to undertake to remedy the conditions on the premises which gave rise to the liability.

5. It is common ground that the plaintiff cannot [illegible] damage caused before the effective date of the release. Cities takes the position that October 24, 1972, the date appearing on the face of the release, was its [illegible]ve date. Doralee argued at trial that the October [illegible] the release was a clerical error and that its real effective date was April 25, 1972. The jury so found pursuant to instructions indicating that the date was a contested issue. We think the trial court was correct in submitting this issue to the jury and we see no reason to disturb the jury's determination.

6. In New York it has been held that a jury may a[illegible]ss punitive damages against a corporation even though the tortious act was not authorized or ratified by a director or an officer. See, e.g., Gill v. Montgomery Ward & Co., 284 A.D. 36, 40, 129 N.Y.S.2d 288 (3d Dept. 1954); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 71-72, 126 N.E. 260 (1920); Rose v. Imperial Engine Co., 127 A.D. 885, 112 N.Y.S. 8 (4th Dept. 1908), aff'd, 195 N.Y. 515, 38 N.E. 1130 (1909). See generally, Prosser, Law of Torts, 11-12, 464 (4th ed./1971); Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1200-03, 1209 (1931); Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 524-26 (1957). But cf., Note, The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees, 70 Yale L.J. 1296, 1306-09 (1961).

7. For discussion, see 6A Moore, Federal Practice ¶ 59.05[3] (1974 ed.).

8. Judge Owen instructed the jury that an intentional violation of the state's environmental laws [illegible] considered in determining whether punitive damages [illegible] appropriate. New York Environmental Conservation Law § 17-0501 provides:

> "It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the Department pursuant to Section 17-0301."

9. Though Cities offered to stipulate that it could meet any award, the judge could not compel acceptance of the stipulation. Judge Owen properly followed New York law in admitting into evidence the stipulation concerning Cities' net worth only after the jury determined that punitive damages were appropriate. Rupert v. Sellers, 48 A.D.2d 265, 269-72, 368 N.Y.S.2d 904 (App. Div. 1975).

10. We note in passing that New York State Environmental Conservation Law § 71-1933, as it read in 1973, provided a fine of not less than $500 nor more than $2500 per violation, and that "[e]ach day upon which such violation occurs shall constitute a separate violation." The jury could have found that Cities was in possession of the premises from the period after MGO ceased operations in February of 1973 through the dismantling of the terminal in midsummer of 1973. There was evidence that substantial seepage occurred during this interval and that Cities deliberately did not appear at an Environmental Conservation

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complaint hearing in April of 1973 because it feared its [illegible] could escalate the fine.

11. 28 U.S.C. § 1870 provides:

> "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> "All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court."

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Richard Withers, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 993 Union Avenue, Bronx, N.Y. 10459.

That on the 4 day of JANUARY, 1978, deponent personally served the within PETITION FOR REHEARING upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By ~~leaving~~ _____ true ~~copies of same~~ with a duly authorized person at their designated office.

By depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

1. GERALD ORSECK, ESQ.
ATTORNEY FOR DORALEE ESTATES, INC.
PLAINTIFF-APPELLEE
ORSECK LAW OFFICES
ROUTE 52 EAST
LIBERTY, N.Y. 12754

2. JOSEPH D. AHEARN, OF COUNSEL
GRUBBS LEAHY & DONOVAN
ATTORNEYS FOR THIRD PARTY
DEFENDANTS-APPELLEES
27 CEDAR ST.
NEW YORK, N.Y. 10038

Richard Withers

Sworn to before me this
4 day of January. 1978

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0230408
Qualified in Queens County
Commission Expires March 30, 1979